(2)

Supreme Court, U.S.
FILED
FEB 1 9 2002
OFFICE OF THE CLERK

No. 01-1059

IN THE

Supreme Court of the United States

ROBERT J. MATZ,
individually and on behalf of all others similarly situated,
Petitioner,

v.

HOUSEHOLD INTERNATIONAL TAX REDUCTION
INVESTMENT PLAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION

LUKE DEGRAND
LUKE DEGRAND & ASSOCIATES
20 North Clark Street
Suite 1450
Chicago, IL 60602
(312) 236-9200

DEBORAH C. SAXE *
KEITH B. BETZINA
PATRICIA J. GALVIN
HELLER EHRMAN WHITE
& MCAULIFFE LLP
601 S. Figueroa Street
40th Floor
Los Angeles, CA 90017-5758
(213) 689-0200

* Counsel of Record

Attorneys for Respondent

February 19, 2002

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

3519

RESTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Did the court below, after remand from this Court for reconsideration in light of *United States v. Mead Corp.*, 533 U.S. 218 (2001), correctly decide that the position stated in an *amicus curiae* brief submitted on behalf of the IRS to another court in a matter involving unrelated parties is entitled to respect, if at all, only under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)?

TABLE OF CONTENTS

	Page
RESTATEMENT OF THE QUESTION PRESENTED FOR REVIEW	i
RESTATEMENT OF THE CASE	5
A. The Household Plan	5
B. Matz	7
C. The Claim Matz Made To The Plan Administrator	7
D. The Lawsuit	8
E. The Seventh Circuit's First Opinion	9
F. The Remand By This Court	10
G. The Seventh Circuit's Opinion On Remand	11
THE PETITION SHOULD BE DENIED	13
I. THE CONFLICT BETWEEN THE DECISION BELOW AND THE DECISION IN *WEIL III* WILL CONFUSE NO ONE	13
II. THE DECISION OF THE COURT BELOW DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT	14
A. The Decision Below Is Consistent With *Mead*, *Chevron*, and *Skidmore*.	14
B. The Decision Below Is Consistent With *Mead*, *Auer*, and *Cleveland Indians*.	19
III. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEALS	25
CONCLUSION	27

TABLE OF AUTHORITIES

CASES — Page

Administrative Comm. of the Sea Ray Employees' Stock Ownership and Profit Sharing Plan v. Robinson, 164 F.3d 981 (6th Cir. 1999), *cert. denied*, 528 U.S. 114 (2000) 14, 15

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) 6

American Express Co. v. United States, 262 F.3d 1376 (Fed. Cir. 2001) 25

Auer v. Robbins, 519 U.S. 452 (1997) ..... *passim*

Babb v. Olney Paint Co., 764 F.2d 240 (4th Cir. 1985) 13, 14

Bruch v. Firestone Tire & Rubber Co., 828 F.2d 134 (3d Cir. 1987), *aff'd in part and rev'd in part*, 489 U.S. 101 (1989) 15

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) ..... *passim*

Christensen v. Harris County, 529 U.S. 576, 120 S. Ct. 1655 (2000) 16

Collignon v. Reporting Services Co., 796 F. Supp. 1136 (C.D. Ill. 1992) 14

Davis v. United States, 494 U.S. 472 (1990) 17

Esden v. Bank of Boston, 229 F.3d 154 (2d Cir. 2000) 25

Falken v. Glynn County, 197 F.3d 1341 (11th Cir. 1999) 25, 26

Foothill Presbyterian Hosp. v. Shalala, 152 F.3d 1132 (9th Cir. 1998) 25

Halliburton Co. v. Commissioner, 100 T.C. 216 (1993), *aff'd without opinion*, 25 F.3d 1043 (5th Cir.), *cert. denied sub nom. Nash v. Halliburton Co.*, 513 U.S. 989 (1994) 13, 14, 15

TABLE OF AUTHORITIES—Continued

Page

In re Gulf Pension Litigation, 764 F. Supp. 1149 (S.D. Tex. 1991), *aff'd on other grounds sub nom. Borst v. Chevron*, 36 F.3d 1308 (5th Cir. 1994), *cert. denied*, 514 U.S. 1066 (1995).....13, 14, 15

Jones v. American Postal Workers Union, 192 F.3d 417 (4th Cir. 1999) 25

Kreis v. Charles Townley, M.D. & Associates, 833 F.2d 74 (6th Cir. 1987) 14, 15

Morales v. Pan Am. Life Ins. Co., 718 F. Supp. 1297 (E.D. La. 1989), *aff'd on other grounds*, 914 F.2d 83 (5th Cir. 1990) 12, 13, 15

Sage v. Automation Inc. Pension Plan and Trust, 845 F.2d 885 (10th Cir. 1988) 14, 15

Skidmore v. Swift & Co., 323 U.S. 134 (1944)..... *passim*

Takacs v. Hahn Automotive Corp., 246 F.3d 776 (6th Cir. 2000)..... 25

Tipton & Kalmbach, Inc. v. Commissioner, 83 T.C. 154 (1984)..... 14

United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 121 S. Ct. 1433 (2001)..... *passim*

United States v. Mead Corp., 533 U.S. 218, 121 S. Ct. 2164 (2001)..... *passim*

Weil v. Retirement Plan Admin. Comm. for the Terson Co., 750 F.2d 10 (2d Cir. 1984) ("*Weil I*")..... 14, 15

Weil v. Retirement Plan Admin. Comm. for the Terson Co., 1988 WL 64862 (S.D.N.Y. 1988), *rev'd*, 913 F.2d 1045 (2d Cir. 1990), *vacated and rev'd*, 933 F.2d 106 (2d Cir. 1991)..... 13

Weil v. Retirement Plan Admin. Comm. of the Terson Co., 913 F.2d 1045 (2d Cir. 1990) ("*Weil II*") 13, 18

TABLE OF AUTHORITIES—Continued

Page

Weil v. Retirement Plan Admin. Comm. of the Terson Co., 933 F.2d 106 (2d Cir. 1991) ("*Weil III*") ..... *passim*

STATUTES

19 U.S.C. § 1202 ..... 19, 21
26 U.S.C. § 401 ..... 1, 5, 6, 14
26 U.S.C. § 402 6
26 U.S.C. § 404 6
26 U.S.C. § 411 ..... *passim*
26 U.S.C. § 501 6
26 U.S.C. § 3111 23
26 U.S.C. § 3301 23
28 U.S.C. § 1292 9
29 U.S.C. § 213 22
29 U.S.C. §§ 1001, *et seq* 2
29 U.S.C. § 1002 5
29 U.S.C. § 1053 6
29 U.S.C. § 1132 2

RULES

19 C.F.R. § 177.8 19
19 C.F.R. § 177.9 ..... 19, 20
26 C.F.R. § 1.411 ..... *passim*
29 C.F.R. § 31.3111-2 23
29 C.F.R. § 31.3111-3 23
29 C.F.R. § 31.3301-2 23
29 C.F.R. § 31.3301-3 23
29 C.F.R. § 541.118 22
29 C.F.R. § 553.210 26
29 C.F.R. § 553.212 26
29 C.F.R. § 553.215 26

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES — Page

IRS Rev. Rul. 72-439, 1972-2 C.B. 223 16
IRS Rev. Rul. 81-27, 1981-1 C.B. 228 16

IN THE

Supreme Court of the United States

No. 01-1059

ROBERT J. MATZ,
individually and on behalf of all others similarly situated,
Petitioner,

v.

HOUSEHOLD INTERNATIONAL TAX REDUCTION INVESTMENT PLAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION

The underlying case involves the question of whether fully vested pension plan participants should be counted in the numerator of the mathematical formula used for determining if a pension plan has been "partially terminated," as that term is used in Article 19.2 of the Household International Tax Reduction Investment Plan (the "Household Plan" or the "Plan"). In compliance with Sections 401(a)(7) and 411(d)(3)(A) of the Internal Revenue Code ("IRC"), 26 U.S.C. §§ 401(a)(7) and 411(d)(3)(A), the Household Plan contains a provision—Article 19.2—stating that the accounts of all participants will be fully vested upon the termination or partial termination of the Plan. Petitioner Robert J. Matz ("Matz") contends that a "partial termination" occurred and that, in accordance with Article 19.2 of the Household Plan,

the amount in his account in the Plan (and the accounts of others similarly situated) should have been fully vested when he (and the others) were laid off. His suit is for benefits allegedly due to him under the Household Plan pursuant to Section 502(a)(1)(B) of the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001, *et seq.* ("ERISA"), 29 U.S.C. § 1132(a)(1)(B).

When considering whether fully vested participants should be included in the numerator of the equation, the court below looked to the partial termination statute, IRC § 411(d)(3)(A). *See* Petition App. at 14a-16a. After finding that neither the statute nor its legislative history provided guidance on the question, the court then looked to the purposes of the statute, which it concluded were (1) to protect employees' legitimate expectation of pension benefits; and (2) to prevent employers from abusing pension plans to reap tax benefits. *Id.* It went on to find that including fully vested participants did not further either of these purposes and it therefore would be logical *not* to include them. Petition App. at 16a-17a.

In its first opinion in this case, the court below nevertheless held that fully vested participants should be included because that was the position taken in an *amicus curiae* brief submitted on behalf of the Internal Revenue Service ("IRS") in *Weil v. Retirement Plan Admin. Comm. of the Terson Co.*, 933 F.2d 106 (2d Cir. 1991) ("*Weil III*"). Petition App. at 18a. The *amicus* brief submitted on behalf of the IRS in *Weil III* argued that the position of the IRS "is that all terminated participants, both vested and non-vested, should be counted in determining whether a partial termination has occurred." Petition App. at 45a. In making this argument, the authors pointed to some Revenue Rulings and the "Plan Termination Handbook" contained in the Internal Revenue Manual. Petition App. at 46a-48a. The court below gave deference to the interpretation set out in the *amicus* brief in *Weil III* because it believed it was "constrained" to do so. Petition

App. at 18a. In so doing, it cited to the decision in *Weil III*, 933 F.2d at 107-08, which deferred to the *amicus* brief because of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"). *Id.*

The Household Plan sought a writ of *certiorari* from this Court on the ground that it was improper to give *Chevron* deference to the *amicus* brief in *Weil III*. This Court vacated the Seventh Circuit's first opinion and remanded the case for further consideration in light of *United States v. Mead Corp.*, 533 U.S. 218, 121 S. Ct. 2164 (2001) ("*Mead*"). *See* Petition App. at 8a.

On remand, the Seventh Circuit found that the position stated in the *amicus* brief in *Weil III* was entitled neither to judicial deference under *Chevron* nor to respect under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) ("*Skidmore*"). *See* Petition App. at 1a-7a. It therefore held that fully vested participants should *not* be considered in the partial termination analysis. Petition App. at 6a.

Citing *Auer v. Robbins*, 519 U.S. 452 (1997) ("*Auer*") and *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 121 S. Ct. 1433 (2001) ("*Cleveland Indians*"), Matz now argues to this Court that the Seventh Circuit should have given *Chevron* deference to the position taken in the *amicus* brief in *Weil III* because the brief states the IRS's interpretation of an ambiguous Treasury Regulation (26 C.F.R. § 1.411(d)-2(b)(1)), as well as an ambiguous statute (IRC § 411(d)(3)). However, the court below was not interpreting the Treasury Regulation. Since the partial termination provision was included in the Household Plan because of IRC § 411(d)(3), the court below quite properly focused its attention on the statute. *See* Petition App. at 14a-19a & 6a.

Furthermore, Matz's proposed *Auer* test, which would involve a tripartite, to and fro analysis, is based upon a misreading of *Mead*, *Auer*, and *Cleveland Indians*. None of

those cases establishes a bright-line rule that an agency's interpretation of one of its own regulations is entitled to *Chevron* deference. To the contrary, the analysis used for determining if deference is due under *Chevron* or *Skidmore* is precisely the same whether the court is considering the interpretation of a statute or a regulation.

Both *Auer* and *Cleveland Indians* involved highly detailed regulatory schemes that established specific definitional tests and rules of the agency's own creation and informal agency pronouncements about how to apply those tests and rules in a particular circumstance. If a test or rule set out in a regulation contained in such a highly detailed regulatory scheme turns out to be ambiguous in a particular circumstance, it is logical for a court to defer to the longstanding interpretation of the agency that created the regulation so long as the agency's interpretation is a permissible one.

There is no similar situation here. The *amicus* brief in *Weil III* does not purport to state the IRS's interpretation of any specific definitional test or rule set out in any regulatory scheme, highly detailed or not. Instead, the *amicus* brief in *Weil III* purports itself to set out a definitional rule that fully vested participants always are to be considered when determining if a partial termination has occurred. Petition App. at 45a.

The IRS never has promulgated any regulations, let alone a highly detailed regulatory scheme, indicating how or when a pension plan should be deemed to have been "partially terminated." The *amicus* brief in *Weil III* was filed with the Second Circuit more than ten years ago. In the last decade, the IRS could have, but has not, issued a regulation (via formal notice and comment rulemaking) explaining how to determine if a qualified pension plan has been "partially terminated" and, if so, when the termination occurred. If it really is the IRS's considered judgment that (as stated in the *amicus* brief in *Weil III*) fully vested participants *always* are taken into account in

the partial termination determination, the IRS certainly could have said so in a regulation issued in the normal course. Such a regulation would be particularly welcome since the only IRS regulation on point is as vague as the statute. It says only that "[w]hether or not a partial termination . . . occurs (and the time of such event) shall be determined by the Commissioner with regard to all the facts and circumstances in a particular case. Such facts and circumstances include: the exclusion, by reason of plan amendment or severance by the employer, of a group of employees who have been previously covered by the plan . . . ." Treasury Regulation 1.411(d)-2(b)(1). There is no specific test or rule here. Instead, the Commissioner simply reserves the right to exercise his/her discretion to determine whether or not a partial termination occurs in a particular circumstance.

In that respect, the regulation at issue in this case is similar to the regulation at issue in *Mead*, which gave Customs' officials a broad grant of unfettered authority to issue tariff classification rulings for particular imports. *Mead*, 121 S. Ct. at 2168-69. Here, as in *Mead*, the regulation at issue provides no guidance whatsoever for making any determination. Accordingly, here, as in *Mead*, there is no reason to give *Chevron* deference to the agency's informal interpretation of the statute or the regulation.

RESTATEMENT OF THE CASE

A. The Household Plan:

The Household Plan is a defined contribution employee pension plan within the meaning of Sections 3(2)(A) and 3(34) of ERISA, 29 U.S.C. §§ 1002(2)(A) and 1002(34), and is intended to be a qualified profit sharing plan under IRC § 401(a).[1] Household International, Inc. ("Household")

---

[1] Both the employer and the employees benefit if a plan qualifies under IRC § 401(a). Employers, within certain limits, are permitted to deduct

sponsors the Household Plan for the exclusive benefit of its employees and employees of its subsidiaries. Household makes matching contributions to the Household Plan on behalf of employees who elect to participate by making their own contributions.

Participants in the Household Plan are 100% vested in the amounts credited to their accounts that is attributable to their own contributions, regardless of length of service. However, until September 1995, the Plan contained a 5-year vesting schedule for employer matching contributions. Article 14.1 provided that a participant obtained a vested interest in the amount credited to his/her account attributable to Household's matching contributions at the rate of 20% per year, becoming fully vested in such amount after five years of service.[2] Under normal circumstances, if a participant's employment was terminated for reasons other than death, disability, or retirement, any unvested account balance was forfeited and used to reduce Household's future matching contributions.[3]

---

contributions made to qualified plans for income tax purposes (whether or not the employees' interests are vested); earnings on the plans' assets are exempt from income tax; and employees defer payment of income tax on employer contributions made on their behalf until they actually receive amounts attributable to such contributions, generally after retirement when their incomes and, hence, applicable tax rates, tend to be lower. IRC §§ 402(a), 404(a), and 501, 26 U.S.C. §§ 402(a), 404(a), and 501.

[2] ERISA and the IRC expressly permit vesting within (or at) five years of service so that employers may reward employees with longer service over those with less service. *See* 26 U.S.C. § 411(a)(2); 29 U.S.C. § 1053(a)(2).

[3] The forfeiture of non-vested benefits to reduce employer matching contributions is expressly authorized by the Internal Revenue Code (26 U.S.C. §§ 401(a)(8) & 411(a)(2)) and ERISA (29 U.S.C. § 1053(a)(2)), and has been recognized as fostering the important goal of plan sponsorship. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 517 (1981).

As required by IRC § 411(d)(3), the Household Plan provided for full vesting if the Plan is terminated or partially terminated. Article 19.2 of the Plan states: "[I]n the case of the termination of the Plan by Household International, Inc. . . . or a partial termination of the Plan with respect to a group of participants, the account balance of each affected participant will become 100% vested."

B. Matz:

Matz was an employee of Hamilton Investments, Inc. ("Hamilton"), a wholly owned subsidiary of Household. He elected to make payroll contributions to the Household Plan and Household made matching contributions on his behalf. His employment at Hamilton was terminated on September 1, 1994, when Household sold substantially all of Hamilton's assets.

At the time of his termination, Matz was 60% vested in the amount credited to his Household Plan account attributable to Household's matching contributions. The remaining 40% (which was valued at $7,289.92) attributable to Household's matching contributions was forfeited. He received a distribution from the Household Plan in the amount of $27,914.10, the full amount of his vested account balances.

In September 1995, Household amended Article 14.1 to eliminate the 5-year vesting schedule, thereby making all participant accounts 100% vested regardless of a participant's length of service. From that point forward, all participant accounts were fully vested.

C. The Claim Matz Made To The Plan Administrator:

In March 1995, Matz sent a letter to the Administrative and Investment Committee of the Household Plan asking to be fully vested because:

> 1. For my part, I kept all goals and objectives as assigned to me at Hamilton Investments. I would have

> hoped to retire from Hamilton Investments or a division of Household International. In effect, the plan was terminated for myself and all other Hamilton employees.
>
> 2. I was almost vested and fell short by only a few months. I feel this should have been taken into consideration by Household or should be evaluated by the committee at the present time.

The Committee denied Matz's request. By letter dated April 5, 1995, the Committee advised Matz that it was required to apply the terms of the Household Plan equitably to all Plan participants and could not make exceptions to the vesting provisions of the Plan for individual participants who had not completed the requisite five years of service.

D. The Lawsuit:

In February 1996, Matz filed a complaint in the United States District Court for the Northern District of Illinois (on his own behalf and on behalf of all others similarly situated) for benefits allegedly due him (and others) under the Household Plan. In the proceedings below, Matz has alleged that the Household Plan was partially terminated over a period of years (September 1994 through May 1, 1996) and, therefore, pursuant to Article 19.2 of the Plan, the Plan should have fully vested his account in the Plan (and the accounts of others similarly situated) when he was (they were) laid off.

On November 24, 1997, the Household Plan and Matz jointly asked the district court to permit them to brief two legal issues, "the resolution of which the parties believe have the potential of narrowing the issues to be tried, or the class to be certified, and may even dispose of the litigation altogether, or a substantial portion of it." On December 22, 1997, the Household Plan moved for partial summary judgment on the first issue: whether participants whose employment was terminated after September 1995, when the Household Plan

was revised to give full vesting, should be considered when determining if a partial termination occurred, and included in the plaintiff class.[4]

On November 30, 1998, the trial court granted the Household Plan's motion to exclude from the purported class those participants whose employment was terminated after September 1995. However, it denied the Household Plan's motion to exclude such participants from the analysis of whether a partial termination occurred. Petition App. at 33a.

On November 30, 1999, the court granted the Household Plan's motion to certify the order of November 30, 1998, for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Finding that an early resolution of the issue had the potential for disposing of this putative class action, the trial court certified the following issue for interlocutory review:

> Whether, for purposes of determining if the Plan was "partially terminated," the court's analysis should include fully-vested employees terminated after the 1995 Plan amendment.

On December 10, 1999, the Household Plan filed a petition for permission to appeal pursuant to 28 U.S.C. § 1292(b), which the Seventh Circuit granted on January 3, 2000. *See* Petition App. at 13a.

E. The Seventh Circuit's First Opinion:

The Seventh Circuit issued its first decision in this case on September 21, 2000. Petition App. at 9a. It affirmed the trial court's decision.

The court below reviewed the partial termination statute—IRC § 411(d)(3)—and its legislative history and concluded that neither provides a clear standard for determining if a partial termination has taken place. Petition App. at 14a-15a.

---

[4] The second issue is not material to the pending Petition and therefore is not discussed herein.

Observing that courts have "generally understood" the purpose of IRC § 411(d)(3) to be: (1) to protect employees' legitimate expectation of pension benefits; and (2) to prevent employers from abusing pension plans to reap tax benefits, the court then said it agreed with the Household Plan that counting fully vested participants would further neither of these purposes:

> From a policy standpoint, the Plan makes a logical argument. Vested participants do not need further protection for their pension benefits and do not benefit from a finding of partial termination. Their benefits, by virtue of vesting, are non-forfeitable. The employer gains nothing either. No monies revert back to it because the benefits are vested and non-forfeitable. *We agree with the Plan's arguments.*

Petition App. at 16a-17a (emphasis added).

The Seventh Circuit nevertheless held that fully vested participants should *not* be excluded from the analysis in this case because the court was "constrained" to give deference to the position taken in an *amicus* brief submitted on behalf of the IRS in *Weil III*. Petition App. 18a. In deferring to the position taken by the IRS in the *amicus* brief, the court below cited *Weil III* for the proposition that it was required to defer to the IRS if its position was "reasonable." *Id.*

On October 5, 2000, the Household Plan filed a petition for rehearing with suggestion for rehearing *en banc* and asked the court below to take judicial notice of the *amicus* brief submitted on behalf of the IRS in *Weil III*. The court below denied the petition for rehearing (Petition App. at 34a-35a) and the motion for judicial notice.

F. The Remand By This Court:

The Household Plan filed a petition for a writ of *certiorari* on February 5, 2001. At the Plan's suggestion, the Court held the petition until after it issued its decision in *Mead* and then

vacated the Seventh Circuit's first decision and remanded it for further proceedings in light of *Mead*. *See* Petition App. at 8a.

G. The Seventh Circuit's Opinion On Remand:

On remand, the court below found that the *amicus* brief was not worthy of judicial deference under *Chevron* and also was not entitled to respect under *Skidmore*. When considering the possible application of *Chevron* deference, it observed that the position taken by the IRS in the *amicus* brief in *Weil III* was supported only by Revenue Rulings and the IRS's position in the Plan Termination Handbook contained in the Internal Revenue Manual. Petition App. 3a-4a. It further observed that "[t]he IRS's position in the *amicus* brief was not born from a formal policymaking procedure" and stated:

> We do not believe that a position set forth in an *amicus* brief, supported by some Revenue Rulings and an agency manual are formal enough to warrant *Chevron* treatment. . . . . Upon reading *Mead*, we find that a litigation position in an *amicus* brief, perhaps just as agency interpretations of statutes contained in formats such as opinion letters, policy statements, agency manuals, and enforcement guidelines, . . . are entitled to respect only to the extent that those interpretations have the power to persuade pursuant to *Skidmore*.

Petition App. at 5a.

Having found *Chevron* deference inapplicable, the court then considered whether the *amicus* brief in *Weil III* was entitled to respect under *Skidmore*. After noting that any respect given to the *amicus* brief under *Skidmore* would depend on its thoroughness, validity, consistency, and persuasiveness, the court reasoned as follows:

> As noted, in our first opinion, although we found the IRS' position reasonable under *Chevron*, we also found it unpersuasive. As we noted, the meaning of "partial

> termination" is unclear because the statutory language is ambiguous, the Treasury Regulation is not helpful, the statutory framework offers no assistance, and the legislative history provides little more guidance. *See Matz*, 227 F.3d at 974. Thus, we looked to the statute's purposes, which are to protect employees' legitimate expectation of pension benefits and to prevent employers from abusing pension plans to reap tax benefits. *See id.* at 975. We agree with the Plan that counting vested participants "would further neither of these purposes." *Id.* "Vested participants do not need further protection for their pension benefits and do not benefit from a finding of partial termination. Their benefits, by virtue of vesting, are nonforfeitable. The employer gains nothing either. No monies revert back to it because the benefits are vested and non[ ]forfeitable." *Id.* We agreed with the notion voiced in *Morales v. Pan Am. Life Ins. Co.*, 718 F. Supp. 1297 (E.D. La. 1989)[, *aff'd on other grounds*, 914 F.2d 83 (5th Cir. 1990)] and *Weil* [*III*] that perhaps only non-vested participants ought to be counted, although neither court so held. Since we indicated that if we were writing on a blank slate we would have held differently, we now adopt the rule that only non-vested participants should be counted in determining whether partial termination of a pension plan has occurred.

Petition App. at 5a-6a.

The Seventh Circuit issued its second decision on September 7, 2001. Approximately two weeks later, on September 21, 2001, Matz filed a motion asking the court to take judicial notice of the *amicus* brief in *Weil III*, as well as a petition for rehearing with suggestions for rehearing *en banc*. On September 25, 2001, the Seventh Circuit granted the motion for judicial notice, but denied the petition for rehearing.[5]

---

[5] Matz's Petition does not include copies of these orders.

THE PETITION SHOULD BE DENIED

I. THE CONFLICT BETWEEN THE DECISION BELOW AND THE DECISION IN *WEIL III* WILL CONFUSE NO ONE.

In its first opinion in this case ("*Matz I*"), the Seventh Circuit followed the decision of the Second Circuit in *Weil III*. Like the court in *Weil III*, it gave *Chevron* deference to the position stated in the *amicus* brief in *Weil III*.

In its second opinion in this case ("*Matz II*"), the court below disagreed with *Weil III* and explained that the difference between its first and second opinions was due to the fact that this Court's decision in *Mead* had clarified the situations in which *Chevron* deference is proper. *Mead* is the law now and, in light of *Mead*, *Matz II* clearly is correct and *Weil III* clearly is wrong. *Weil III* was decided before *Mead* under the wrong standard of judicial deference.

No plan administrator—in the Second Circuit or elsewhere—is going to follow *Weil III* now that there is *Matz II*. *Matz II* settles the law on this point.[6] It now is

---

[6] *Matz II* is consistent with *Babb v. Olney Paint Co.*, 764 F.2d 240 (4th Cir. 1985), and *In re Gulf Pension Litigation*, 764 F. Supp. 1149, 1165 (S.D. Tex. 1991), *aff'd on other grounds sub nom. Borst v. Chevron*, 36 F.3d 1308 (5th Cir. 1994), *cert. denied*, 514 U.S. 1066 (1995). The only other reported cases addressing the issue of whether fully vested participants should be considered in a partial termination analysis are *Halliburton Co. v. Commissioner*, 100 T.C. 216 (1993), *aff'd without opinion*, 25 F.3d 1043 (5th Cir.), *cert. denied sub nom. Nash v. Halliburton Co.*, 513 U.S. 989 (1994), and *Morales v. Pan Am. Life Ins. Co.*, 718 F. Supp. 1297 (E.D. La. 1989), *aff'd on other grounds*, 914 F.2d 83 (5th Cir. 1990). *Halliburton* left the issue unresolved (100 T.C. at 243-44) and the *Morales* court relied without analysis upon the trial court's second opinion in *Weil*, which was reversed in *Weil II*, which was reversed in *Weil III*. *See Weil v. Retirement Plan Admin. Comm. for the Terson Co.*, 1988 WL 64862 (S.D.N.Y. 1988), *rev'd*, 913 F.2d 1045 (2d Cir. 1990) ("*Weil II*"), *vacated and rev'd on this point*, 933 F.2d 106 (2d Cir. 1991) ("*Weil III*").

evident to one and all that fully vested participants should be excluded when deciding if a partial termination has occurred.

II. THE DECISION OF THE COURT BELOW DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

A. The Decision Below Is Consistent With *Mead*, *Chevron*, and *Skidmore*.

The concept of a "partial termination" comes from IRC § 411(d)(3), which declares that a plan is not "qualified" under IRC § 401(a) unless the plan provides that, "upon its termination or partial termination, . . . the rights of all affected employees to benefits accrued to the date of such termination [or] partial termination, . . . to the extent funded as of such date, or the amounts credited to the employees' accounts, are non-forfeitable." IRC § 411(d)(3). The Household Plan contains a partial termination provision because of this statute.

Federal courts consistently have held that a partial termination occurs if there has been a permanent reduction of a "significant percentage" of plan participants because of a major corporate event. *See, e.g., Administrative Comm. of the Sea Ray Employees' Stock Ownership and Profit Sharing Plan v. Robinson*, 164 F.3d 981, 987 (6th Cir. 1999), *cert. denied*, 528 U.S. 114 (2000) ("*Sea Ray*").[7] When making

---

[7] *See also Halliburton Co. v. Commissioner*, *supra*, 100 T.C. at 234-36; *Sage v. Automation Inc. Pension Plan and Trust*, 845 F.2d 885, 890 (10th Cir. 1988); *Kreis v. Charles Townley, M.D. & Associates*, 833 F.2d 74, 79 (6th Cir. 1987); *Babb v. Olney Paint Co.*, *supra*, 764 F.2d at 243-45; *Weil v. Retirement Plan Admin. Comm. for the Terson Co.*, 750 F.2d 10, 12-13 (2d Cir. 1984) ("*Weil I*"); *Collignon v. Reporting Services Co.*, 796 F. Supp. 1136, 1141 (C.D. Ill. 1992); *In re Gulf Pension Litigation*, *supra*, 764 F. Supp. at 1168; *Tipton & Kalmbach*,

this analysis, courts routinely exclude various kinds of participants from the numerator of the partial termination equation. *See, e.g., Halliburton*, 100 T.C. at 238, 245-49. They exclude those who died, retired at normal retirement age, voluntarily resigned, were terminated for cause or because of disabilities, were transferred to successor plans, or were rehired shortly after being laid off. *See id.*; *Sea Ray*, 164 F.3d at 988; *Sage*, 845 F.2d at 891; *Kreis*, 833 F.2d at 81-83; *Weil I*, 750 F.2d at 13; *In re Gulf Pension Litigation*, 764 F. Supp. at 1168. The *Halliburton* court explained that it was proper to exclude from the numerator those who died, retired at normal retirement age, or were terminated for cause because:

> The discontinuance of such employees' participation in the plan is deemed not to be attributable to Halliburton's reductions in force, and so such employees are deemed not to have been affected by such action. . . . Moreover, the account balances of employees who died or retired at normal retirement age were *fully vested* upon occurrence of such events.

100 T.C. at 238 (emphasis added).

The question presented to the court below was whether other fully vested participants also should be excluded. This question is particularly important in this case because Matz claims that the Household Plan was partially terminated as a result of allegedly "related" corporate events occurring between September 1, 1994, and May 1, 1996, and the Household Plan was amended during that period—in

---

Inc. v. Commissioner, 83 T.C. 154 (1984); *Morales v. Pan Am. Life Ins. Co., supra.*

As the Third Circuit observed in *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 151 (3d Cir. 1987), *aff'd in part and rev'd in part*, 489 U.S. 101 (1989), the appropriate focus of the inquiry is the "percentage of employees in the plan who were affected by the transaction said to constitute a partial termination."

September 1995—to fully vest the accounts of all participants. Thus, the accounts of all participants whose employment was terminated after September 1995 were fully vested. The court below was faced with a unique situation. No other court has addressed the impact of a plan amendment fully vesting all plan participants midway through the period in which the plaintiff claims a partial termination occurred.

The only courts that have given deference to the position taken in the *Weil III amicus* brief are the Seventh Circuit in *Matz I* and the Second Circuit in *Weil III*. Petition App. 17a-18a; *Weil III*, 950 F.2d at 110. Both gave deference to the *amicus* brief only because they erroneously concluded that deference was required by *Chevron*. Petition App. 3a; *Weil III*, 950 F.2d at 107-110.

After this Court vacated *Matz I* and remanded the case for further proceedings in light of *Mead*, the court below correctly found that the *amicus* brief in *Weil III* is not entitled to deference under *Chevron*. It is not the product of formal notice and comment rulemaking or any IRS adjudicatory procedure. Moreover, the only authority cited in the *amicus* brief that specifically supports the IRS's position on the issue of counting fully vested participants is the Internal Revenue Manual. Under *Mead*, 121 S. Ct. at 2173-75, and *Christensen v. Harris County*, 529 U.S. 576, 587 (2000), agency manuals are not entitled to *Chevron* deference. It would be strange and illogical if the act of citing the Internal Revenue Manual in a litigation brief accorded the Internal Revenue Manual greater stature than it would have on its own.[8]

---

[8] The *amicus* brief also included the IRS's interpretations of two Revenue Rulings, Rev. Rul. 72-439, 1972-2 C.B. 223, and Rev. Rul. 81-27, 1981-1 C.B. 228, neither of which addresses the issue of counting or not counting fully vested plan participants, or whether any fully vested participants were involved in the partial terminations at issue in those rulings. Since, in addition, Revenue Rulings do not have the force or effect of law and do not bind the courts, they should be accorded no

In declining to grant the *amicus* brief deference under *Chevron*, the court stated that it did not "believe that a position set forth in an *amicus* brief, supported by some Revenue Rulings and an agency manual are formal enough to warrant *Chevron* treatment." Petition App. at 4a-5a. The court correctly found that the *amicus* brief in this case was the functional equivalent of the classification ruling at issue in *Mead*:

> In *Mead*, the court declined to give *Chevron* deference to a tariff classification ruling issued by the United States Customs Service. 121 S. Ct. at 2174. The Court explained that deference was not due because Congress did not indicate that it meant to delegate authority to Customs to issue classification rulings with the force of law, Customs did not engage in notice-and-comment practice when issuing the rulings, and they were not binding on third parties. *See id.* We do not consider a position in an *amicus* brief to be more deserving of *Chevron* deference than a tariff classification ruling. Upon reading *Mead*, we find that a litigation position in an *amicus* brief, perhaps just as agency interpretations of statutes contained in formats such as opinion letters, policy statements, agency manuals and enforcement guidelines, *see id.* at 2175, are entitled to respect only to the extent that those interpretations have the power to persuade pursuant to *Skidmore*.

Petition App. at 5a. The court below correctly concluded that the *amicus* brief in *Weil III*, like the classification ruling at issue in *Mead*, therefore is best treated like "interpretations contained in policy statements, agency manuals, and enforcement guidelines," and thus "beyond the *Chevron* pale." *Mead*, 121 S. Ct. at 2175.

---

weight (*see Davis v. United States*, 494 U.S. 472, 484 (1990)); their inclusion in an *amicus* brief does not alter this.

The court below also correctly concluded that the *amicus* brief in *Weil III* is not entitled to respect under *Skidmore*. In its view, the position taken in the *amicus* brief is not persuasive. Indeed it is not! The *amicus* brief states the IRS's position on a matter at issue in the *Weil* litigation matter. It is argumentative and, in it, the IRS is forced to say that equally "official" pronounce-ments of the IRS are wrong. It states that a determination letter issued by a local IRS district office "did not represent the IRS's position then and hence was issued erroneously." Petition App. at 48a. It also states that an IRS Agent who testified under oath that the IRS focuses on the percentage of non-vested terminatees was "misinformed as to the IRS's actual position." Petition App. at 50a n.6.[9] Moreover, the position taken in the *amicus*

---

[9] The courts in *Weil v. Retirement Plan Admin. Comm. for the Terson Co.*, 913 F.2d 1045 (2d Cir. 1990) ("*Weil II*"), *vacated and rev'd*, 933 F.2d 106 ("*Weil III*"), and *Weil III* noted the following inconsistencies in positions taken by the IRS:

- in a determination sent to the plan in 1981, the IRS had considered only non-vested participants in concluding that no partial termination had occurred (*Weil III*, 933 F.2d at 110);
- an IRS agent had testified at deposition that the IRS, when examining the percentage of terminated participants, focuses on the percentage of participants discharged without vested benefits (*Weil II*, 913 F.2d at 1051); and
- Form 5310, which a pension plan can use to request a determination from the IRS as to whether a pension plan has been partially terminated, asks an employer to provide, in addition to the total number of participants terminated, the number of participants terminated without full vesting (*Weil II*, 913 F.2d at 1051 n.2).

In previous briefs in this case, Matz has asserted that IRS Form 5310 is not material since the accompanying instructions advise the reader to use IRS Form 5300, not IRS Form 5310, when seeking a "partial termination" determination from the IRS. This is a quibble. IRS Form 5300 also asks one seeking a "partial termination" determination to tell the IRS the number of participants terminated without full vesting.

brief—that "all terminated participants, both vested and non-vested, should be counted in determining whether a partial termination has occurred" (Petition App. at 45a)—purports to state a rule applicable in every circumstance. It therefore is flatly inconsistent with the Treasury Regulation, which requires the Commissioner to consider "all the facts and circumstances" in a particular case when deciding if a partial termination has occurred. Treasury Regulation 1.411(d)-2(b)(1). In addition, as explained by the court below, the position taken in the *amicus* brief does not further the goals of the statute. Petition App. at 16a-18a. *See also* Petition App. at 5a-6a.

B. The Decision Below Is Consistent With *Mead*, *Auer*, and *Cleveland Indians*.

Asserting that the *amicus* brief in *Weil III* states the IRS's interpretation of an ambiguous Treasury Regulation (26 C.F.R. § 1.411(d)-2(b)(1)), as well as the ambiguous statute (IRC § 411(d)(3)), Matz argues that the court below was obliged to defer to the *amicus* brief under *Auer*. In making this argument, Matz fails to understand the standards set forth in *Mead*, *Auer* and *Cleveland Indians*.

None of those cases makes any distinction between the analysis appropriate for an agency's interpretation of a regulation, rather than a statute. Indeed, *Mead* itself involved two regulations—19 C.F.R. § 177.8 and 19 C.F.R. § 177.9—as well as a statute—the Harmonized Tariff Schedule of the United States, 19 U.S.C. § 1202 (the "HTSUS"). The regulations authorized the Secretary of the Treasury to issue "ruling letters" setting tariff classifications for particular imports (19 C.F.R. § 177.8) and stated that:

> A ruling letter represents the official position of the Customs Service with respect to the particular transaction or issue described therein and is binding on all Customs Service personnel in accordance with the provisions of this section until modified or revoked. In

> the absence of a change of practice or other modification or revocation which affects the principle of the ruling set forth in the ruling letter, that principle may be cited as authority in the disposition of transactions involving the same circumstances.

19 C.F.R. § 177.9(a).

The Court in *Mead* held that ruling letters issued by Customs officials pursuant to these regulations are not entitled to judicial deference under *Chevron*. In so doing, it explained:

> [W]hether or not they enjoy any express delegation of authority on a particular question, agencies charged with applying a statute necessarily make all sorts of interpretive choices, and while not all of those choices bind judges to follow them, they certainly may influence courts facing questions the agencies have already answered. . . . . The fair measure of deference to an agency administering its own statute has been understood to vary with the circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position, *see Skidmore*, *supra*, at 139-140 . . . . This approach has produced a spectrum of judicial responses, from great respect at one end . . . to near indifference at the other . . . .
>
> "The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." [*Skidmore*,] 323 U.S., at 140 . . . .

Mead, 121 S. Ct. at 2171-72 (citations and footnotes omitted).

The *Mead* Court went on to explain that *Chevron* deference is appropriate for "a category of interpretive choices

distinguished by an additional reason for judicial deference." *Mead*, 121 S. Ct. at 2172. One kind of interpretive choice that clearly qualifies for *Chevron* deference is a regulation issued after public notice and comment pursuant to a statutory grant of authority to define a specific provision of a statute. As explained in *Mead*,

> [W]hen Congress has "explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," *Chevron*, 467 U.S., at 843-844, 104 S. Ct. 2778, and any ensuing regulation is binding on the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.

Id. at 2171. *Chevron* deference also is appropriate where Congress did not expressly delegate authority or responsibility to implement a particular provision or to fill a particular gap, but it nevertheless is apparent to the court that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law. *Id.* at 2172.

In *Mead*, this Court held that *Chevron* deference clearly is not appropriate for ruling letters issued by Customs pursuant to the applicable regulations. *Id.* at 2173. First, the HTSUS did not indicate that Congress meant to delegate authority to Customs to issue classification rulings with the force of law. *Id.* at 2174. Second, the ruling letters were regarded by Customs as not binding on third parties; to the contrary, Customs viewed them as binding only on itself and the importer to whom they are issued and, even then, only until Customs has given advance notice of intended change. *Id.* In addition, "[s]ince ruling letters respond to transactions of the moment, they are not subject to notice and comment before being issued, may be published but need only be made 'available for public inspection,' 19 U.S.C. § 1625(a), and . . .

could be modified without notice and comment under most circumstances." *Mead*, 121 S. Ct. at 2169. The ruling letter at issue in *Mead* set out a rationale in some detail, but many ruling letters contain little or no reasoning. *Id.*

Both *Auer* and *Cleveland Indians* involved circumstances that were quite different from the situation in *Mead* and that entitled the agency interpretation to deference under *Chevron*. Both involved highly detailed regulatory schemes that establish specific definitional tests and rules. Because such tests and rules cannot possibly anticipate every fact or circumstance that might arise in their application, the agency of necessity must interpret them when applying them to the facts and circumstances of a particular situation. The agency's application of such regulations in a consistent manner over time represents the agency's understanding of the tests and rules that are set out in its own regulations.

In *Auer*, this Court gave *Chevron* deference to an agency pronouncement contained in an *amicus curiae* brief filed by the Secretary of Labor at the request of the Court. The *amicus* brief explained the Secretary of Labor's interpretation of the "salary basis" test set out in 29 C.F.R. § 541.118(a), as applied to public sector employees. That regulation is one of many issued by the Department of Labor ("DOL") pursuant to Congress's express delegation of authority to "defin[e] and delimi[t]" the scope of the exemption from overtime compensation for *bona fide* executive, administrative, and professional employees. 29 U.S.C. § 213(a)(1). It provides that an employee is not paid on a salary basis if the salary is "subject to" reduction for penalties imposed for disciplinary reasons (other than for infractions of safety rules of major significance). *Auer*, 519 U.S. at 456. The *amicus* brief explained that the DOL interprets the "subject to" language of the salary basis test to deny exempt status to employees covered by a policy permitting disciplinary or other deductions in pay that creates a "significant likelihood" that

such deductions will be made "as a practical matter." *Auer*, 519 U.S. at 461. This Court gave *Chevron* deference to the position in the *amicus* brief after noting that the Secretary's interpretation of the "subject to" language was reasonable and that, "[b]ecause the salary basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (internal quotations omitted). The Court also noted that there was no reason to suspect that the interpretation did not reflect the agency's fair and considered judgment on the matter in question. *Id.* at 462.

Cleveland Indians involved the application to backpay of the IRS's long-held regulations interpreting the tax provisions of the Federal Insurance Contributions Act, 26 U.S.C. § 3111(a) ("FICA"), and the Federal Unemployment Tax Act, 26 U.S.C. § 3301 ("FUTA"). Those regulations—29 C.F.R. §§ 31.3111-3, 31.3111-2(c), 31.3301-2, and 31.3301-3(b)—specify that FICA and FUTA taxes "attach[ ] at the time that the wages are paid" by the employer and are "computed by applying to the wages paid by the employer the rate in effect at the time such wages are paid." *Cleveland Indians*, 121 S. Ct. at 1444. Although the regulations do not expressly address backpay, the IRS has consistently interpreted them to require taxation of back wages according to the year the wages are actually paid, regardless of when those wages were earned or should have been paid. *Id.* In holding that, for FICA and FUTA tax purposes, backpay should be attributed to the year in which it actually was paid, this Court gave deference to the IRS's consistent past interpretation of its own regulations:

> Echoing the language in [FICA and FUTA], these regulations have continued unchanged in their basic substance since 1940. . . .

> Although the regulations, like the statute, do not specifically address backpay, the [IRS] has consistently interpreted them to require taxation of back wages according to the year the wages are actually paid, regardless of when those wages were earned or should have been paid. . . . . Because that interpretation is reasonable, it attracts substantial judicial deference. . . . . We do not resist according such deference in reviewing an agency's steady interpretation of its own 61-year-old regulation implementing a 62-year-old statute.

Id. at 1444-45.

In *Auer* and *Cleveland Indians*, the regulations being construed—unlike the regulation Matz cites here or the regulations at issue in *Mead*—provided specific tests, rules and standards. The IRS has yet to promulgate such implementing regulations for determining whether a partial termination of a pension plan has occurred. Here, the cited regulations do not provide any specifics to be applied to particular facts or circumstances. The regulation simply states that the Commissioner will consider "all the facts and circumstances in a particular case" and then identifies one factor to be considered. *See* Treasury Regulation § 1.411(d)-2(b)(1). It does not purport to explain how a "partial termination" is to be determined and gives no clue as to what percentage of excluded employees constitutes a partial termination or which employees, only partially vested or also fully vested, to include in that group. The Treasury Regulation cited by Matz is not the equivalent of the regulations at issue in *Auer* and *Cleveland Indians*, and the *amicus* brief in *Weil III* was not interpreting a rule that is "a creature of the [agency's] own regulations." *See Auer*, 519 U.S. at 461. Indeed, Matz is asking this Court to treat the position taken in the *amicus* brief as if the brief itself were a valid substitute for specific language in a regulatory rule.

Auer and *Cleveland Indians* presented much stronger cases for heightened deference than that presented here. Both cases involved agency interpretations of specific, detailed regulations; here, the *Weil III amicus* brief at most advanced a position with respect to a regulation that mirrored the ambiguity found in the statute. Furthermore, in *Auer* and *Cleveland Indians*, the agency position addressed the specific factual situation confronting the Court; here, the agency position was set forth in an *amicus* brief addressing a completely different set of facts.[10]

III. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEALS.

Matz cites Court of Appeals cases in which courts gave great weight to agencies' informal interpretations of their own regulations.[11] These cases are readily distinguishable from this one on at least two grounds. First, in each of the cited

---

[10] The *amicus* brief in *Weil III* did not address the situation before the Court. It did not consider a situation where, as here, all plan participants became fully vested part-way through the period in which the partial termination allegedly occurred. Moreover, in the amicus brief in *Weil III*, the IRS said it requested (on Form 5310) the number of non-fully-vested participants because "if all of the terminated participants are vested, the question whether there has been a partial termination would be a moot point, since the benefits of terminated vested participants are nonforfeitable regardless of whether there has been a partial termination." Petition App. at 49a. This language suggests that the IRS's position in this case might very well be different from the position it took in *Weil III*. After all, the applicable regulation requires the Commissioner to consider "all the facts and circumstances" of each particular case.

[11] Matz cites *American Express Co. v. United States*, 262 F.3d 1376, 1382-83 (Fed. Cir. 2001); *Takacs v. Hahn Automotive Corp.*, 246 F.3d 776 (6th Cir. 2000); *Esden v. Bank of Boston*, 229 F.3d 154 (2d Cir. 2000); *Falken v. Glynn County*, 197 F.3d 1341 (11th Cir. 1999); *Jones v. American Postal Workers Union*, 192 F.3d 417 (4th Cir. 1999); and *Foothill Presbyterian Hosp. v. Shalala*, 152 F.3d 1132 (9th Cir. 1998).

cases, the Court of Appeal was grappling with an interpretation of a longstanding and highly detailed regulatory scheme setting out specific definitional tests, rules, and exemptions. None of them involved the sort of vague generalities presented by the regulation at issue in the instant case.

Also, in each of those cases, it is clear that Congress left a gap in the statute for the agency to fill and that the agency exercised that authority. For instance, in *Falken v. Glynn County*, the court was confronted with the applicability of the "fire protection activities" exemption to the general presumption that all workers are entitled to overtime pay for hours worked in excess of 40 in a week. Although the statute set forth the exemption, it did not define the term "fire protection activities," thus leaving a gap to be filled by the DOL. Armed with this delegation of authority, the DOL promulgated an extensive and detailed series of regulations setting forth not only the definition of "fire protection activities" in a four-part test, 29 C.F.R. § 553.210(a), but also creating three related tests for determining whether an employee falls under the exemption. 29 C.F.R. §§ 553.212 and 553.215. In deciding an issue arising under one of these three tests, the court properly deferred to an interpretation of the test in an opinion letter previously issued by the DOL.[12] *Id.* at 1349-50.

When this Court issued its decision in *Mead*, it was well aware that lower courts would be called upon to make "reasoned choices" when determining the level of deference to be accorded to particular agency actions: "It is, of course, true that the limit of *Chevron* . . . itself is a good example showing when *Chevron* deference is warranted, while this

---

[12] The test at issue in *Falken* was called the "80/20 test." It provided that employees who otherwise would be exempt under the "fire protection activities" exemption, would lose that exemption if they spent more than 20 percent of their time on nonexempt activities. 29 C.F.R. § 553.215.

is a good case showing when it is not. Judges in other, perhaps harder, cases will make reasoned choices between the two examples, the way courts have always done." *Mead*, 121 S. Ct. at 2176 n.18. The fact that other courts, including the court below, have made these reasoned choices is not a basis for granting *certiorari*.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

LUKE DEGRAND
LUKE DEGRAND & ASSOCIATES
20 North Clark Street
Suite 1450
Chicago, IL 60602
(312) 236-9200

DEBORAH C. SAXE *
KEITH B. BETZINA
PATRICIA J. GALVIN
HELLER EHRMAN WHITE
& MCAULIFFE LLP
601 S. Figueroa Street
40th Floor
Los Angeles, CA 90017-5758
(213) 689-0200

* Counsel of Record

Attorneys for Respondent

February 19, 2002